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THE URGENT CASE FOR AMERICAN LAW REFORM:
A JUDGE'S RESPONSE TO A LAWYER'S PLEA

Why should it take so long?

—Warren E. Burger

JAMES O. MONROE, JR.*

INTRODUCTION

THOSE OBSERVING today's American legal system or affected by its results seem to be anything but pleased with the way it functions. Those concerned, disposed to discuss it, and willing to do something about it include some members of the bench and bar. One such lawyer is John Frank, whose recent plea for American law reform has caused a considerable stir in the legal profession, first in lecture form, and now as a book entitled *American Law: The Case for Radical Reform*.¹

This is not a review of that book, but rather a judge's response to a lawyer's presentations, which is "customary and usual in the profession." It is a judge's place and function to respond to what lawyers say. And if we respond regularly and readily on the bench to whether plaintiff or defendant should win, we should likewise respond to presentations raising the much greater question whether the legal system works at all. Indeed, on the highest and best authority, we are told that we should take an active affirmative part in improving the administration of justice.²

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1. FRANK, *AMERICAN LAW: THE CASE FOR RADICAL REFORM* (1969) [hereinafter FRANK]. Mr. Frank is the author of numerous other works on our legal system and our judges, including eight other books. See *Symposium: John Frank and the Radical Reform of American Law*, 47 TEX. L. REV. 965 (1969). The best continuing coverage of the main topic may be that of *JUDICATURE*, the journal of the American Judicature Society, and the *STATE TRIAL JUDGES JOURNAL*, published in connection with the National College of State Trial Judges, and the Judicial Administration Section of the American Bar Association.

2. See remarks of Chief Justice Warren E. Burger, reported in *AMERICAN BAR*

This professional duty to make the American legal system work is a long standing duty, too often neglected, but today more pressing than ever before. What the Frank work provides in this context is a report, a warning, a catalogue of needs, and an itemized approach to reform. Let us now consider, reflect upon and supplement his format.

THE PROBLEM: TOO MANY CASES TO HANDLE?

The volume of cases in our major courts is awesome and frightening. In the federal trial courts there are more than 80,000 pending cases, one-fourth of which are two to three years old; more than 70,000 more are being filed each year. From 1941 to 1967, annual filings increased 84 per cent, and the pending case backlog increased 170 per cent.³ In state trial courts the volume is worse. New York City's civil court has a backlog of 150,000 cases, with 100,000 more being filed each year. Los Angeles (including minor courts) has approximately 180,000 new case filings per year, which is two and one-half times the total for all federal courts.⁴ Many Chicago civil cases are four to five years old; the current backlog of major civil jury cases is 41,237.⁵

Criminal case data are likewise appalling. Nation-wide arrests for the seven major crimes are some two and one-half million a year, and for all crimes, some six million a year, five million of these in urban areas.⁶ Traffic charges, not included as crimes, number four million a year in California, and nearly three and one-half million a year in New York City alone.⁷

The situation has grown much worse in recent years. In 1958, Chief Justice Earl Warren said: "Interminable and unjustifiable delays in our courts are today compromising the basic legal rights of

NEWS, vol. 14, no. 7, p.2, July, 1969: "Why should it take so long? I ask each judge, federal and state, each lawyer, prosecution or defense, and each law teacher to join to make the American system work."

3. FRANK at 10.

4. FRANK at 10, 11.

5. Director of the Administrative Office of the Illinois Courts, REPORT (June, 1970).

6. FRANK at 161. See also 1970 WORLD ALMANAC, Newspaper Enterprise Assn., 83.

7. FRANK at 161.

countless thousands of Americans, and, imperceptibly, corroding the very foundations of government in the United States.”⁸ In 1967, he said: “Unless something new and effective is done promptly in the area of judicial research, coordination and management, the rule of law in this nation cannot endure.”⁹ For those involved, the result is deeply personal: frustration, bitterness, and loss. Thus, we must face

the fundamental moral issue involved; [which is] a legal system should not treat people like this. A man ought to be able to do business without waiting five years to find out whether he is financially alive or dead. This is 10 per cent of a man's adult life, largely spent in waiting for a court to reach him. The best that can be said for a legal system of ordered relationships that takes this long to come to a result is that the system is simply no good; it fails to perform the job the community should reasonably expect of it.¹⁰

What is now before us is but a part of what is yet to come. The civil and criminal case loads will obviously be affected by the population explosion. More people will mean vastly more litigation. This future case load must be anticipated in complex multiples we have not yet fully considered. Thus, ten percent more people may produce not ten percent, but perhaps fifty or one hundred percent more cases. Our population will not be evenly dispersed over large or chiefly rural areas for tranquil co-existence, but jammed into unbearable cities and monstrous suburbs, where mere proximity, the daily coming and going, “getting and spending,” the “uptightness” of the young, the desperation of the old, and the frantic competition of the entire population will compound our litigation. A thousand people on an Illinois prairie may live quite at peace; however, a thousand packed into a single block in Cicero or Hyde Park may cause considerable friction.

The case-load increase will be affected not only by numbers of people, but also by the kinds of litigation. New developments of the past twenty years have seen a fantastic proliferation of cases in fields theretofore unseen: desegregation, reapportionment, anti-trust, criminal and constitutional law, and civil rights. Coming developments regarding students, public servants, strikes, demonstrations, unemployment, economic and social status, new inventions, and even

8. FRANK at 2.

9. FRANK at 2.

10. FRANK at 9.

the right to live or die, may be just as prolific.

Prospects of coping with this volume and complexity by some form of "speed-up" arrangement or computerized mechanism are not very comforting. The incompetence and indifference found in manual systems may be compounded by blind mechanization. Computers are no better than their programmers. Confusion computerized may come out chaos. We might hope for systematic and unswerving legal results, but we could get instead a volume of well-processed injustice, which could lead to mass rebellion.

What have we done about it? Classical remedies are mentioned: dropping distinctions between law and equity, abolishing common law forms of pleading, and so on. More current devices are touched: split trials dividing liability and damages, pre-trial conferences, compulsory arbitration, shifts from court to court, shortened jury voir dire, and pattern jury instructions. Beginning structural changes are noted, such as Illinois' state-wide court reorganization. The broad, hopeful recommendations of the Arden House conferees on the "law explosion" are noted. Yet "nothing in the prospects for changes in procedure will materially affect calendar congestion and delay."¹¹ Likewise, adding more courts and more judges is not effective and may not even be necessary. This "ace in the hole" has already been played and has failed. "The remedy is not more judges but 'better housekeeping within the judiciary itself.'"¹²

Let the immensity of the challenge be fully shown. "The full adoption and operation of all of these [standard] proposals will probably not bring enough improvement in the legal system to make up for the drag that will be caused by the expansion of the American population from 200 million to, say, 210 million."¹³ "Not only has the legal machinery of the country been further burdened and further

11. FRANK at 25.

12. FRANK at 5, quoting Judge Albert V. Byran of the Fourth Circuit Court of Appeals.

13. FRANK at 26. To lawyers and judges concerned with their task, both the problems and the past proposals are an old and tragic story. The warnings and counsel of Saint Luke, Shakespeare, Roscoe Pound, and Arthur Vanderbilt are echoed in current views. Studies and suggestions are institutionalized in the work of the American Judicature Society, the American Law Institute, the National Conference of Trial Judges, the Institute of Judicial Administration, the Tydings Committee, and the National College of State Trial Judges, and covered in stacks of reports. These are cited or respectfully mentioned by Mr. Frank.

exhausted between 1958 and 1968, but hope has been very nearly exhausted, too."¹⁴

So, what is called for is "radical" reform: first, lightening the load on the judicial machinery by taking some traditional things out of court entirely; second, by renovating the functions; third, by improving lawyers and judges and staff personnel; and, fourth, one would add, by simply oiling up the machinery and stepping on the gas.

SUBSTANCE: LIGHTENING THE LOAD

What could we do to lighten the incredible load? Mr. Frank has made a number of suggestions, the first relating to our present means of handling personal injury cases, especially auto accident claims. Auto cases make up about three-fourths of all major contested civil cases and a third to one-half of all cases tried, and should be reviewed.¹⁵ Citing the vagaries of the fault system (forty-seven percent recovering in full, ten percent recovering in part, forty-three percent not compensated at all), Frank calls our present means "a terrible system . . . inefficient, incompetent, unjust."¹⁶ He says it puts "an overwhelming premium on character deterioration and perjury, [and] in the big controverted cases . . . the system is at its slow-moving worst."¹⁷ He would consider: (1) abolishing the fault concept for determining liability; (2) providing automatic self-insurance for the first \$10,000 of injury, leaving only the bigger cases for court-trial treatment; and (3) government "auto-care" for some uninsured cases.¹⁸ He is neither satisfied nor happy with these proposals, but is perturbed at the present injustice and deeply disturbed by this unwieldy load on the courts.

14. FRANK at ch. 3.

15. FRANK at 71-72. Accidents in the United States run some thirteen million a year, deaths over 50,000, disabling injuries close to two million, medical expenses \$600,000,000, wage losses \$2,600,000, property losses \$3,300,000,000. Insurance premiums went from \$2,600,000,000 in 1950, to \$9,200,000,000 in 1966. Litigation figures are tricky, but they indicate that some seventy percent of those persons injured retain legal counsel and thirty-five percent sue. While only three or four percent go to trial, these trials constitute sixty-five to eighty percent of all civil court cases; while many are settled, those tried are about one-third to one-half of all contested civil cases.

16. FRANK at 74.

17. FRANK at 74.

18. FRANK at 70-84.

Next, procedures for refining our approach to justice must be reviewed to see if they are worth the time and effort involved. "In the interest of perfection, we run the risk of pricing justice out of the market."¹⁹

The results of this suggestion would, ideally, be the elimination of needless "decision points." Experience under a federal class action situation and other federal rules are cited by Mr. Frank as examples of the value of this approach. More familiar to most lawyers would be state pre-trial procedures, likewise considered valuable until recently, but now so increasingly cumbersome many lawyers and judges are beginning to doubt their utility.²⁰

Present and proposed substantive law also needs to be reconsidered, not only for its substantive effect, but for its potential for creating litigation—especially complex litigation with many decision points. The Uniform Commercial Code, contracts, conflicts of laws, and taxation are areas which are especially in need of this type of re-evaluation.²¹ The grounds and procedures for handling divorce also serve as examples. Assuming the right of two people to meet, mate and separate, "the young couple does not have a God-given right to tie up the legal system of the United States."²² Grounds for divorce could be abolished so that "divorce, which is now as a practical matter consensual, should become so as a matter of law."²³ Alimony collection claimants could be relegated to the same remedies as other creditors, with contempt as a remedy only when these have failed and there is open defiance of the obligation; on the other hand, for child support delinquency, contempt would be automatic, unless the delinquent showed otherwise—not as now,

19. FRANK at 90.

20. Successful pre-trial requires judges and lawyers who are willing and eager to make it work. Experience in Chicago indicates as many as three successive conferences, apparently intended for discovery, for settlement, and for last-chance arrangements—but it may come to successive wheel-spinning. Downstate, even with elaborate court-sponsored checklists and arrangements, it is often simply an occasioned contact between lawyers who say or do little about the case and could just as easily settle, if they chose, wholly outside of court. While it is useful in a highly complex discovery case, it seldom involves any "decision point" at all, and is often simply a waste of time for the lawyers and the court.

21. FRANK at 3.

22. FRANK at 111.

23. FRANK at 113.

when the delinquent goes free unless the child shows otherwise.²⁴ Both provisions would expedite justice and lessen litigation. Property settlements should be facilitated by the utilization of out-of-court accounting.

The arithmetic cases should not be handled by the courts. In probate matters, fiduciaries should have broad general powers to buy, sell, and pay claims; we can have self-proved wills, and allow a clerical check of accounts, leaving the judiciary to act only in real disputes.²⁵ In real property security cases, trust deeds should be used instead of mortgages, eliminating cumbersome and perfunctory mortgage foreclosure cases.²⁶ In personal property cases, the creditor could be granted a repossession remedy against the property or a money judgment against the debtor, but not both, thus eliminating deficiency judgment proceedings.²⁷

Finally, insurance liquidation and receiverships should be in the federal courts, eliminating duplication or proliferation in the several state courts.²⁸ However, this list of suggestions is not meant to be exhaustive. It could be extended in probably any state jurisdiction. This is offered merely as a sample of what we could do—if we would.

PROCEDURE: RENOVATING THE FUNCTIONS

But if the present volume, plus the increase due to a more densely populated nation and to new kinds of litigation, is as vast as we must reasonably expect, then lightening the load of the present kinds of cases will not really relieve us, for the old ones we weed out will simply be replaced by new ones and, no doubt, in larger numbers. And though we may be trying only the more essential cases, deciding real disputes instead of approving formalities, there will be little comfort, for the load will still be there. We must turn, therefore, to improving the functions of justice itself.

24. FRANK at 115-16.

25. FRANK at 117-18. In 1964, under the new Illinois judicial article, down-state Illinois probate work went from "real" judges with robes and live court reporters to magistrates (who then had neither), and it was apparently viewed by some lawyers and judges as something between idiocy and treason—until they learned that the probate court in Chicago had been manned by clerks for years!

26. FRANK at 118-19.

27. FRANK at 119.

28. FRANK at 120.

Why do scientists and historians in pursuit of truth help each other, and trust each other's sources, while lawyers fight and dispute, trusting only an eye witness? In other words, are the adversary system and the hearsay rule really all they seem to be?

Why aren't exhibits made ready in advance and pre-marked?

Why must a lawyer waste half a day attending a docket call when his case will get thirty seconds attention—all that is needed to tell him what later day it might be heard?

Why hold a hearing on an estate account which everybody concerned has seen and nobody concerned disputes?

Why hear witnesses only one at a time? If three people saw the accident, why not swear them in together and hear their testimony as a group, as is precisely the way the investigating officer originally heard it? That is what the state's attorney, defender, and probation officer do when they report the "facts" for a pre-sentence report. That is what husband and wife do, standing before the court, each asking to be given the child. As all twelve jurors sit there, with thirty more waiting out front, the jurors are examined in panels of four by questions, to individuals or to the whole panel. If they can be examined in groups, why not witnesses? Who has more to say about deciding a case, the witnesses or the jurors? Put otherwise: if three lawyers can talk at once, why not three witnesses?

Why put "lawsuits before lawsuits"—elaborate pre-proceedings to determine which parties are necessary, proper, indispensable; who has standing; who may come in; who may benefit; who is bound? Mr. Frank correctly notes:

Statewide and local judges' conferences should go over the minutiae of their own proceedings to satisfy themselves inch by inch and step by step that they are operating as economically as they can, both in time and in overall costs to lawyers and clients as well as to taxpayers.²⁹

This might lead to conference-type trials and part-trials, which should be permitted.³⁰

Another inefficient aspect of our legal system is the tendency of litigants to gamble at the expense of their opponents and the taxpayers. This ought to be discouraged by making it costly to do so.

29. FRANK at 133-34.

30. FRANK at 133-34.

For example, if a party is asked to admit a point and unreasonably refuses, the cost of proving it, including attorney fees, should be charged against him.³¹ Similarly, in a damage case, the claimant might be required to state his lowest demand, the defendant his highest offer. If the verdict plus any other pertinent factors show the demand unreasonably high, or the offer unreasonably low, costs and counsel fees might be charged the unreasonable party.³² Finally, stipulations which are obviously proper (based on some evidence, inferable, or shown from records and such things plus the judge's "private judicial notice") and which ought to be made, but are unreasonably refused, can be adopted by court order.³³

Other procedures for speeding the process of justice are: mediation of money demand cases, using non-judicial personnel such as trained insurance adjusters responsible only to the court;³⁴ pre-trial conferences which include direct, court-initiated settlement efforts;³⁵ summary judgment procedures used at as many points before and during trial as possible, and without the usual length of notice,³⁶ for "[s]ummary judgment, instead of being the exception, should be the rule on at least some issues."³⁷

To improve the *quality* of justice: court experts, now employed in appraisals, sales, and criminal case psychiatry, should be used in other fields, such as medicine, engineering, accounting, business practice, etc., all with proper safeguards and responsible only to the court, and they should be allowed to report or testify summarily and in conclusion or in large-scale summation, rather than item by item.³⁸ One remedy for enforcing civil judgments should embrace all relief needed, and old law-equity distinctions should not preclude this.³⁹

31. FRANK at 137.

32. FRANK at 139.

33. FRANK at 140.

34. FRANK at 142.

35. FRANK at 146.

36. FRANK at 151.

37. FRANK at 151.

38. FRANK at 153-54 (accountants). The practice, now established in Illinois for "independent medical evidence" in civil cases (ILL. REV. STAT. ch. 110A, Rule 215, 1969) and criminal case psychiatry (ILL. REV. STAT. ch. 38, § 104 *et seq.*, 1969), should be extended to other fields.

39. FRANK at 156.

A short-cause docket should be kept, on which litigants could have their cases tried on a stand-by basis. Litigants could become eligible by certifying that all pre-trial matters are concluded and both sides will be ready upon a brief notice. When the court was free, the short-cause cases could be called in rotation by telephone, or the free time could be announced and those ready could go to trial immediately.⁴⁰

CRIMINAL CASES

In the field of criminal law, the need for improvement is just as great. Various proposals are: Pre-trial conferences could limit issues, rule on motions, determine evidence questions involving confessions or search and seizure, prepare instructions, or arrange scheduling at the very least;⁴¹ bills of particulars, interrogatories, and discovery, already used in many states by defendants, should be broadened in scope and made available to the state;⁴² when the state's good faith is questioned, its files should be examined;⁴³ reasonable plea bargaining with both sides fully on the record (without binding the court or precommitting any side to undisclosed facts) should be allowed and encouraged;⁴⁴ juries should be picked in hours, not days;⁴⁵ misdemeanors should be left to minor disposition, (and what is a minor or major violation should be determined as early as possible);⁴⁶ uniform criminal jury instructions should be used, as in civil cases;⁴⁷ an after-hours court should be maintained for immediate availability of warrants to arrest or search, for immediate setting of bail, for immediate advice regarding counsel, for court record warnings regarding rights of the defendant,⁴⁸ or other miscellaneous

40. FRANK at 157. Like genuine pre-trial conferences, the device depends on the willingness of lawyers. In Madison County, Illinois, the trial court called for it, and forms showing readiness and listing cases for short call were made available; nothing came of it.

41. FRANK at 170.

42. FRANK at 163.

43. FRANK at 164.

44. FRANK at 164.

45. FRANK at 165.

46. FRANK at 165.

47. FRANK at 167.

48. FRANK at 166.

uses;⁴⁹ the insanity defense should be abolished, and become relevant not to guilt or innocence, but to questions of sentence or treatment; alternatively, the question of guilt or innocence should be tried first, and then the question of sanity would be considered, with or without jury, at the defendant's option.⁵⁰

ADMINISTRATION

Yet, lightening the load and improving the machinery will not do the job, if the machinery is not well managed. Hence the following suggestions are presented.

Each state should have a central administrative office, with power to move personnel around the state as needed, putting manpower with the cases. This should ideally be in a fully unified trial court system, such as that in Illinois, and, in any case, under the state's highest court, with constitutional, statutory, or rule-making power to direct personnel as needed.⁵¹

49. Many criminal cases are "over-indicted" because there is no real consideration in early stages of how the case can be proved, or even how serious it is. In the grand excitement of the immediate post-crime situation, a suspect is found and the press reports the case solved. Preliminary hearings are avoided, ostensibly: (1) to prevent tipping the prosecution's hand; (2) to hold the accused; and (3) to save time. Police reports are sketchy or go unread; the prosecution is uninformed; if the defendant gets a lawyer or complains too much, he is released on light bail or recognizance; and if not, he stays locked up until the grand jury meets "in a few days." When the grand jury comes, one witness appears, usually a police officer who personally knows nothing of the case but reports his investigation (hearsay). The prosecution is still not really informed, and may be overconfident. As the case approaches trial, discovery is deferred, perfunctory or unimplemented; both sides go uninformed. On trial day, or just before, when the chips are finally down, the lawyers examine the witnesses, and the truth comes out; the indictment perhaps cannot be proved, or the offense was far less serious than the grand excitement made it appear. The result is a negotiated plea on a charge reduced to a misdemeanor, or with a punishment commensurate with a misdemeanor charge. Did the avoidance of preliminary hearing save time? Of course not—it caused the state attorney's staff, the defender's staff, court staffs, felony division personnel, the grand jury, the sheriff, the jailer, a felony judge, and a court reporter to take needless time and do needless work on a case disposable without them. Meanwhile, the statutory requirement for preliminary hearings has been violated by those charged to follow and enforce the law. And those involved as victims and accused are disgusted.

Wholly apart from principles of justice and morality, the preliminary hearing could be used for the early disposition of cases. A night court is just the place for such early disposition—the principals involved are free from their employment, and court facilities and manpower are not tied up with bigger things.

50. FRANK at 170.

51. FRANK at 172. For the latest guide to court administration, *see* FRIESEN, E. GALLAS & N. GALLAS, *MANAGING THE COURTS* (1970).

Each court area should have a case-judge assignment system that works for it, each judge with his individual block of cases, or a "master calendar" block using several judges. Scheduling should be adjusted accordingly. Priorities among divisions, between civil and criminal cases, and for use of juries and courtrooms must be worked out as required on the local level.⁵²

Modern technology should be considered.⁵³ Bookkeeping machines should obviously be employed for accounting records; little more is needed if these are properly used. Computers are not needed for this; they would be expensive and the benefits would be illusory. However, computers might be useful in scheduling cases, sorting which should come first, eliminating lawyer conflicts, and assigning trials, which would require a fantastic amount of input data, all of which might be wasted or corrupted by the granting of another continuance because one party is not ready. On the other hand, computers might routinize our arrangements so that we could not or would not make the loose decisions of a manual system.

Where there are genuine major case-load personnel maladjustments, the "flying squad" system must be considered.⁵⁴ This should be for real need, not merely to use some of the judges so that most of the others could take long vacations, or simply for a public relations show, or to otherwise "improve the image."

52. FRANK at 172-75. The "master calendar" or central assignment system is quite helpful in bringing together, into a newly unified trial court like the Illinois system, judges who had heretofore been their own bosses in separate county, probate, city, municipal, justice or magistrate bailiwicks. Judge assignment shifting under a "master calendar" system makes judges familiar with more numerous fields of law than they have handled before. But it also makes it easy for lawyers to "pick their judges," and for judges to avoid individual responsibility for moving cases to disposition and to obscure their individual record of productivity or effectiveness.

A current preference or trend, discernible in discussions at the 1970 term of the National College of State Trial Judges, Reno, Nevada, is toward the individual calendar.

For the pros and cons, see O'Neill, *The Single Assignment System*, TRIAL JUDGES' JOURNAL, vol. 5, no. 1, Jan., 1966; and Waugh, *The Central Assignment System*, TRIAL JUDGES' JOURNAL, vol. 5, no. 2, April, 1966.

53. FRANK at 172.

54. FRANK at 176-77. The "flying squad" describes teams of judges transferred from relatively light load areas to those of heavy backlogs. In Brooklyn, in 1968, a criminal docket of 650 cases was reduced to 250 in a six-month period. This reviewer's own experience with the Chicago summer "crash" program in 1969 was far less impressive.

THE SYSTEM: PERSONNEL, FACILITIES AND MEANS

Lightening the load and improving the system will be a cruel illusion if we do not give it adequate housing and equipment, and run it with people trained and disposed to do the job it ought to do. We must consider the lawyers, judges, and staff who work in the system, the buildings and equipment we provide it, the money we allow, and the kinds and amounts of study we make.⁵⁵

Whether institutions succeed or fail because of their systems or their people is an old and often fruitless inquiry. The need for better systems, so clear from what we have seen so far, should not be obscured or treated lightly because better personnel might have made the need for systemic change less obvious or might make those reforms more effective. That people are as important as the load or the rules of the road is quite clear; however, for the abnormal delay in the legal system, a good share of the blame lies with the dilatory lawyer and the acquiescing judge. "Some lawyer delay is outright pathological . . . [occasioning] so complete a breakdown of function that the lawyer falsely reports to the client that he has done things which in fact he has never begun."⁵⁶ Some of this is subcultural and mendacious, attributable to small groups of lawyers or a few individual lawyers who would corrupt the system for their own selfish ends;⁵⁷ some is due to legitimate tactical advantage; and

55. Facilities, budgets, and personnel of local state trial courts are established and maintained under obsolete local laws and arrangements largely beyond the control of judges. In Chicago, the fabulous new Civic Center court building is full of deputy clerks and bailiffs and messengers, but there are few official court reporters. Illinois court facilities and equipment are generally under the control of the courthouse committee of boards of supervisors, local bodies neither trained in nor overly conversant with the needs of courts; and judges responsible for court operations have little to say about them. Deputy clerks are chosen by the clerk; and while many turn out to be competent and diligent, their original appointments are often political. Bailiffs, while nominated by judges, are appointed and paid by the sheriff. Politically-oriented court staffs leave much to be desired. These court staff offices should be better manned, better equipped, and better organized. They should have more money, more wisely spent; and judges should have more to say about how it is allotted.

56. FRANK at 34.

57. FRANK at 34. Tales of contingent fee plaintiff counsel preferring their good cases over their bad ones, or of defense counsel piling up per diem charges for needless made-work appearances may be discounted. Some of the lawyer delay rises from a near monopoly falling understandably and creditably to the abler counsel. The question is whether one highly able firm, or one highly able lawyer within a firm, should be allowed to take on so many cases that even though working

some is due to poor organization by the lawyer. The "prime cause" is "a cause so simple as to sound almost silly when said aloud: lawyers and judges are frequently dilatory in their work, and thus delay litigation longer than it needs to be delayed, because in many cases that's the kind of people we are."⁵⁸ Law students are "indocinated in delay from the moment they hit the law school [N]othing has to be done on time except the final examination, and not always that [T]he case system . . . is unquestionably the slowest method of acquiring information that the mind of man can devise."⁵⁹ In court, since there are no deadlines, and "dockets are so congested that nothing is ever going to happen anyway,"⁶⁰ we have our own version of Parkinson's law: "time is almost always available, our work does tend to fill and overflow the available time,"⁶¹ we do many things twice or several times, and each time takes longer than the first. Some hope may lie with "a few teachers of law who may wish to try out some new ways of teaching . . . and . . . a few judges who wish to encourage promptness by means other than punishment to procrastinating attorneys."⁶² But largely the cause lies with lawyers and with the judges who put up with them. It is pleasant and convenient for judges to do so. Most judges are not con-

heroically, with case after case back-to-back, counsel ties up the docket of a multiple-judge court. See *Gray v. Gray*, 6 Ill. App. 2d 571, 128 N.E.2d 602 (1955). Should such a busy firm be required to pass the file to an associate? Does a constitutional right to counsel, civil or criminal, permit the denial of the constitutional right of others to a speedy trial? On a criminal call, does a busy defender trying one case have a right to defer speedy justice for his other clients? What about a rule automatically precluding any postponement for appearance in another cause when counsel has more than so many cases in the court? See *Knickerbocker Printing Corp. v. United States*, Chambers memorandum of Mr. Justice Jackson, 99 L. Ed. 1291 (1954).

58. FRANK at 35. If the cause is pathological, why not consider a psychological solution? We live in a surrogate world. Outraged claimants on the civil side, and criminal defendants eager to be released from jail or bond or to get it over with, clamor for their day in court. But a surrogate world involves a considerable amount of fantasy: the notices go to the lawyers. If rules required an address for each party personally, filed with the first pleading, and hearing notices were given the clients as well as their lawyers—regularly, on a spot-check basis, or after unreasonable postponements or other delay—counsel could hardly fail to inform their clients or have them in court, or say "the court was too busy"; instead, the "pushers" would be the lawyers, instead of conscientious clerks or frustrated judges.

59. FRANK at 36-37.

60. FRANK at 35.

61. FRANK at 39.

62. FRANK at 40.

stitutionally opposed to work, and are responsible, conformist, or amiable enough to do the work assigned to or laid before them; however, being human, few of them are disposed to seek out work. So if the lawyers are not ready, or settle one out of ten scheduled cases and postpone the other nine, judges are ready enough to go home, go golfing, or use their time more fruitfully than waiting for lawyers. Howard James has put the frightful delay as due to *both* "dilatory lawyers" and "lazy judges."⁶³ One would hesitate to call it a corrupt bargain, but it is certainly far too often a cozy arrangement. This is not to say all or even a large part of the judges, or lawyers, are at fault; indeed, the masters of delay in both groups may be few. But as habits and proclivities of lawyers vary, so do those of judges:

[T]here is a perfectly prodigious range of productivity among judges. If it could be done, the cheapest, easiest, fastest way to cut the backlog would be to bring the low-producing judges to a higher level of performance.⁶⁴

Apart from dilatory lawyers and lazy judges, there is at the root of our delay some incredible mismanagement. It is self-deceiving, fatuous, not to say downright stupid, to talk about too few courtrooms, or too few judges, when many courtrooms are empty and some judges are gone almost every afternoon. This again is commonplace among the well-informed. What it comes down to is not a matter of shortages at all, nor of unwillingness among those concerned, but of scheduling something that works. A legal system that is functioning, and functioning correctly, is not five years behind.

Within the system, we must admit we have been warned, from many and disparate sources. It may indeed be significant that the message comes from such a legal scholar as Justice Arthur Vanderbilt⁶⁵ and such a political pragmatist as Mayor Richard Daley⁶⁶ in virtually the same words: the courts do not belong to the lawyers or the judges—the courts belong to the people!

For the lawyers' part in the problem of delay, there are three recommendations. Firstly, consider altering legal education to reduce dilatory habits. Set up daily deadlines, cultivate speedy research,

63. JAMES, *CRISIS IN THE COURTS*, 25, 27 (1968).

64. FRANK at 51.

65. VANDERBILT, *THE CHALLENGE OF LAW REFORM* 132 (1955).

66. Address to the Illinois Judicial Conference, Chicago, Ill., June 7, 1962.

inculcate promptness.⁶⁷ Secondly, emphasize judicial administration, in the same depth and intensity as law schools have emphasized substantive, procedural, and social reforms.⁶⁸ Finally, consider the step-by-step handling of cases from the time the client enters the office, with short-cuts and time-savers at every step, in and out of the courtroom, to increase the efficiency of the legal system.⁶⁹

For the judges' part in the problem of delay, the recommendations are several. Start to assure judicial pay roughly comparable to the income of good lawyers.⁷⁰ Work to devise improved methods of selecting judges.⁷¹ Consider specific training for judicial careers, like the training of German and French judges, in a judicial civil service system.⁷² Give judges advanced training in substantive, procedural and administrative courses when they take the bench, and from time to time thereafter as refreshers. Expand the program of the National College of State Trial Judges to regional or local courses and adapt the program for federal judges as well as state judges.⁷³ Improve court facilities.⁷⁴ Devote needed funds to judi-

67. FRANK at 40.

68. FRANK at 43.

69. FRANK at 49.

70. FRANK at 51.

71. FRANK at 53. Illinois is now in the throes of a battle over how to get and keep good judges, involving great and rending issues both professional-technological and governmental-political. Everybody says he wants good judges, yet nobody can convince many beyond his own partisans that he knows how to get them. One issue involves judicial ethics, a controversy of more smoke than proven fire, with the defaults of a few on both state and national scenes besmirching the diligent responsible work of many, and with frustrated people set to burn barns to kill rats, impugning daily the institutions of law and order they want and purport to preserve. The selection issue, involving variables unfamiliar even to most partisans, boils down to a conflict between the elite approach claimed by its opponents to entail control of judicial selection by the bar recommending and the executive appointing judges under variants of the "Kales-Missouri" plan, and popular approach claimed by its opponents to entail control by political bosses and their party followers under managed convention nomination and politically dominated elections. A compromise may lie in non-partisan open primary nomination and non-partisan separate ballot election—controlled by neither the elite group nor the political group and short of compromise enjoying little support from either. See, *Judicial Selection and Tenure*, American Judicature Society, Chicago, 1967, Glenn Winters, ed., and "A Primer on Illinois Courts," memorandum prepared by this reviewer for the Judicial Committee of the Illinois Constitutional Convention, in which the variables are considered.

72. FRANK at 54.

73. FRANK at 56.

74. FRANK at 58.

cial research, and to the court budgets themselves: "We die in part of creeping penury."⁷⁵ Activate and expand the Federal Judicial Center, and the programs of the National Court Assistance Act.⁷⁶

These proposals are not visionary moral preachments evangelistically supposing that if we come to church, cleanse our souls, or join the American Bar Association section of Judicial Administration, somehow the juridical world will be saved. They are long-range but very practical approaches to the human problems soluble less immediately than substance and procedure, but just as, or perhaps more important. That we must look beyond the immediate, while it may appear radical, should not be deplored or stigmatized as such but should rather be welcomed. For the need to look beyond is a measure of our crisis:

[W]e have come to the end of the road on existing programs. There is nothing that the profession is seriously ready to accept that will cure the situation. We have lost the last great recourse in which we have put faith, the endless proliferation of judges and courtrooms. . . . We must be prepared for radical innovation.⁷⁷

HABITS: TIME AND TROUBLE

Radical innovations? Fine, if you can get them, and if we will use them. But, in spite of these perceptive observations and plausible recommendations, radical innovations will mean nothing unless we change our attitudes. What is intrinsically required is straight thinking, rising from conscientious concern, on the part of the lawyers and judges.

Illinois adopted a new judicial article for its antiquated constitution in 1962, effective in 1964. It provided, among other things, for the most sweeping structural change in a state trial court system of any that had been devised.⁷⁸ At one stroke, all the confusing, overlapping, wasteful trial courts (circuit, superior, probate, county, city, municipal, criminal, justice of the peace, and police magistrate courts) were abolished, and in their place was established a single trial court with general jurisdiction over all justiciable matters. All the judges

75. FRANK at 32.

76. FRANK at 58.

77. FRANK at 58-59.

78. ILL. CONST. art. VI. The new text was so described by Justice Tom C. Clark on a number of occasions, including an address at "Citizens Conferences on Illinois Courts," Springfield, Ill., Feb. 7, 1970.

of all the former courts were now a part of the single circuit court, and they could be transferred anywhere in the state as work loads required. What happened? In many ways we blundered. Old snobberies persisted; circuit judges were still thought better than associate judges, who still were thought better than magistrates. Old empires could not be broken up; legally autonomous city courts became practically autonomous divisions. Old practices prevailed; law jury cases bogged down by poor assignment practices remained bogged down. Judicial politics, which had protected the lazy, the aged, the infirm, and the incompetent, not to say the corrupt, from the enlightened bar, the disgusted public, and the inquisitive press now protected them from action by a powerful but often non-functioning courts commission. What was needed, and what is still needed, is straight thinking and conscientious concern.

If we had that straight thinking and conscientious concern, radical innovation could be viewed as common sense, or the same results could be achieved by other means. Consider some not-so-hypothetical situations, and some not-so-silly questions.

In my town, the local newspaper editor starts clipping the wire at six o'clock in the morning. At seven, the printers start to work, as do the carpenters, bricklayers, and painters; doctors and nurses are already at the hospital. About 7:30 the high school teachers and kids are in their "home rooms." The post office opens at eight. Most stores are open by 8:30 and the staffs of banks and savings and loans have by this time begun their daily routine. Yet the main people in the courthouse who have arrived before nine o'clock are the custodians (who let the real estate abstracters into the record offices at eight). Clerks, sheriffs, lawyers, court reporters, and judges begin arriving at nine, and some stand around waiting for "docket calls" and case assignments. Jurors who arrive at 9:30 may not get their first case until ten, eleven, one o'clock, or the next day. *We start too late.*

Suppose we ran courts like football games, television shows, railroads, buses, or airlines. Whenever the event is scheduled, it goes on. If the passengers are late, the train, plane, or bus is gone. If it is ten below zero, the Green Bay Packers play anyway—and 50,000 spectators simply brave the cold. If the cross-country team arrives at the field too late for a warm-up and is not ready to run, they must run

anyway—cold. Not so in court. If plaintiff's counsel goes to his office first to see "an important client" or to open his mail, the defense counsel does not object and the judge does not insist—the case is delayed. If counsel is in another court, his partner does not take over—the case is postponed. If it is snowing, the jurors may make it to court, but the lawyer calls in and says he will be late, or if he is "not ready" or has "not completed the pretrial," again opposing counsel is accommodating and the judge is "understanding" (he was a lawyer himself, not so long ago)—so the case is continued. *Many times, we do not start at all.*

Suppose we ran courts with a stop watch. A surgical operation is quickly executed, because the time allowed is all the patient can take, or all the concentrating surgeon can allow himself. The mail is sorted at high speed, because the trucks are waiting. The class convened on time is also dismissed on time, because another class is coming. The printers race against time because the presses and newsboys are waiting. Not so with the courts, the lawyers, and the judges. It takes hours instead of minutes to pick a jury; it takes too long to make an opening argument; it takes too long to qualify a document; a "ten-minute recess" usually takes half an hour; instead of conferring quickly and quietly at the bench, we retire to chambers, smoke and joke, while the jury sits and fumes. Much of this is self-defeating; a long-winded opening statement can cost counsel his receptivity with the jury; a long-winded and slavishly routine argument can cause him to miss his one most cogent point. Nor do we stop on time; instead, we dally past four or five, instead of getting back to the office to check instructions or briefs for the next day, because we know we can be late the next morning again. When we do run, we do not run on time. In effect, *we waste more court time than we use.*

It sounds foolish to say we should do everything twice. Yet, in many cases we do—and sometimes more than twice. If a case is set, but continued and rescheduled three times, this means that the lawyers come to court three times for absolutely nothing. Assume each time half an hour in coming from the office, an hour waiting and appearing, and half an hour returning to the office; there are two wasted hours each time, or a total of six fruitless hours. Assume it is a fairly simple case, with three or four witnesses on the

pertinent issues, and pretrial admissions or discovery and stipulations on nonessentials; the whole case might take no more than six hours of courtroom time to try. Add six hours for the three false starts to the six hours trial time, and the case took twice as much time as was needed. If the lawyer cannot charge this to his client, he has cost himself six hours office time; at fifty dollars an hour that comes to three hundred dollars. If he charges it to his client, it may be as three "court appearances"; three days "in court" at \$250 a day is \$750 for no production.

Now think of the others involved. The clerk set that case three times, which took a word with the judge, typing and mailing setting notices, preparing a trial list, taking part in the rearrangements, noting the continuance and resetting, and handling the file. The judge and court reporter face a similar situation. It is, therefore, a needless waste of manpower. For the staff it is like running the train without passengers. For the litigants and lawyers it is like making the trip three times and coming back without getting off at the destination—and paying the fare regardless. We must ask for each fruitless excursion—is this trip necessary? Why not start earlier? Why couldn't judges get together at eight in the morning, assign the cases and have them ready at nine? Why not then convene on time? Why ask the lawyers *if* they are ready? Why not assume they *must* be? Courts of review do that. Why not trial courts? Our habits look like the continuous binge of a chronic drunk, or the truancy of an incipient dropout. If a lawyer's or judge's secretary handled her time as her boss handles his, she would be fired. And the only reason the clients and litigants put up with it is that they have nowhere else to go.

If we don't believe this, consider the following possible rule:

For any continuance or postponement, or consent thereto, in addition to the presentation of counsel, the personal approval of the litigant (or if a corporation, of a regular corporate officer or agent) shall be shown the court, by verified endorsement on or attached to any written motion, or by personal appearance in court on any oral motion.

Drastic! Extreme! Wild! Perhaps so. But if the litigants were required to approve the delays that the lawyers ask and the judges permit, we would find out very quickly what the public thinks of court delay, and consequently what the people think of lawyers and judges, and why. If we think this does not put the focus on the very

heart of the matter, try that rule on lawyers and judges—and see how many nerves you strike.

No constitutional convention is needed for such a rule. No statute is required. It could be adopted in about one minute by any state supreme court with broad rule-making power, or by any trial court under its power to make rules regulating dockets, calendars, and business.⁷⁹ With such a rule as this, if the judicial system is not to function on a given day, the litigants for whom the system exists will have as much to say about it as will the lawyers and judges who just work there.

If such a rule would put too much of the responsibility on the lawyers, the judge's responsibility for delay should likewise be pinpointed and exposed. Thus we could put judges on an individual calendar basis; bring them to compete; and publish the record (properly weighted and explained) of their respective accomplishments.⁸⁰

The standard response to all this from the profession—lawyers, judges, and law professors alike—is to say that while justice delayed is justice denied, justice in haste may be justice in error. To such a response, there are two obvious replies: (1) For justice in error there are remedies—post-trial motions whereby the court may correct its own error, and appeal whereby errors may be ordered corrected or corrected ad hoc by a higher court; (2) For justice delayed, there is no remedy but action. We are always ready for emergency matters—with immediate temporary relief of various sorts: attachment, garnishment, replevin, ne exeat, receivership, interpleader, and the classic temporary injunction; why can we then not be ready for ordinary relief in ordinary cases weeks or months after they arise? Justice delayed until the key witness is gone, or the zip has gone out of the case, or the parties have lost all hope, is no justice at all.

Our problem is not too many cases, or too few lawyers, or a lack of judges or courtrooms. It is a lack of common sense in our response to the public trust. The problem of habit and attitude is so pervasive that attempts to change things begun by one judge, lawyer, or small group are often not only ineffective, but also may

79. See, e.g., ILL. REV. STAT. ch. 110, § 2-2 (1969). The mechanics of getting the client's signature would raise no real difficulty. A client's signature seems easy enough to get when a lawyer wants a change of venue or substitution of judge!

80. *Supra* note 52.

even be looked on by colleagues or associates as extraordinary or out of order. The problem is systemic and calls for group attitude and effort.

CONCLUSION: URGENCY

All of this we have said for reform has been couched in traditional terms of today's overwhelming backlogs to be compounded by the greater backlogs of tomorrow, under the joint and several impact of a population explosion and an expanded body of substantive law. But there are perhaps even more significant causes of urgency, compelling, crashing quasi-political causes.

Beyond all the traditional backlogs and responsibilities, "the courts perform a vital function as a policy-making branch of government."⁸¹

There is, particularly when the legislatures either of states or of the nation are at dead center, pressure to accept policy-making cases as a result of widespread feeling that courts are the best place to get policy made. On the national level, segregation, redistricting, and church and state questions are turned into lawsuits for this purpose; locally, sharp issues over zoning, regulation of business, community planning, and elections may similarly turn up in court. At times the remote third branch of the government has been more responsive to popular will and need than the executive or the legislative. This function, too, must not be destroyed in an engulfing tide of trivia.⁸²

The legal profession and the judiciary have taken a distinguished and honored part in resolving many of the major issues of our nation. Today the function of the lawyer and court is all too often ignored. They must return to it, for from them must come the expertise the citizenry must have to continue evolving as a viable society. To paraphrase Diana Trilling, if lawyers and judges do not reform us, who will; and if we are not reformed, what kind of future do we face?⁸³

The foregoing items, for which the courts provide an eminently proper forum and for which court time simply must be allotted, come to the courts because of gaps in legislative, executive, and administrative schemes for disposition. Great waves of other cases, of an appalling oceanic totality, are dumped on the courts through an overweening legislative zeal. Reference is to the vast numbers of cases rising from sumptuary legislation, by which those supposedly

81. FRANK at 123.

82. FRANK at 123.

83. *On the Steps of Low Library*, 46 COMMENTARY 29, 37 (1969).

speaking for the people undertake to regulate the personal lives and morals of the people: in fields of drunkenness, narcotics and drug abuse, gambling, disorderly conduct and vagrancy, abortion, sexual behavior, and juvenile delinquency.⁸⁴ This is neither to denigrate the police power, nor to suggest that the legislative branch cannot or should not regulate matters of the public health, safety, and welfare. It is simply to call ardent attention to the result.

We must strip off the moral excrescences of our criminal justice system so that it may concentrate on the essential. The prime function of the criminal law is to protect our persons and our property; these purposes are now engulfed in a mass of other distracting, inefficiently performed, legislative duties. When the criminal law invades the spheres of private morality and social welfare it exceeds its proper limits at the cost of neglecting its primary tasks. This unwarranted extension is expensive, ineffective, and criminogenic.⁸⁵

Only when the load of law enforcement has been lightened by stripping away those responsibilities for which it is not suited will we begin to make the criminal law a more effective instrument of social protection.⁸⁶

We Americans live today in a terribly twisted time. Those shouting "Peace!" may carry bricks; those shouting "Law and order!" may carry axe handles or form vigilante groups. Between "Weathermen" on the left and "rednecks" on the right, there is precious little middle ground. The great American center has been driven into stark polarization, in some substantial part by those who promised to bring us together.

Courts find themselves precisely in the middle. Trial courts are at the heart of the storm. It is not the quiet storm center Holmes could view from the "Marble Palace," but instead it is in and around the courtroom itself.⁸⁷ Judges are not only in the middle of the

84. Morris and Hawkins, *The Overreach of the Criminal Law*, MIDWAY, vol. 9, no. 3, Winter, 1969, University of Chicago, p. 72. MORRIS & HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL*, 1 (1970).

85. MORRIS & HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL*, *supra* note 84, at 2.

86. "Task Force Report: The Courts," 1967, p. 107, supporting document with *The Challenge of Crime in a Free Society*, Commission Report, The President's Commission on Law Enforcement and Administration of Justice, Nicholas Katzenbach, Chairman.

87. Wholly apart from the contending forces of the legitimate litigants themselves, courts are subjected to all sorts of pressure. The indirect pressures, social, political, public, and personal, are so familiar as to warrant no mention; they can be avoided, turned aside, or ignored. Other pressures are direct, requiring court attention or actual orders to preserve court authority, restore order, arrange for press media, protect court integrity, and assure justice for the parties—in the face of challenges from outsiders. Illinois examples are abundant: in *People v. Speck*,

fight, they are in the vital center⁸⁸ philosophically, or should be. Here in the center is the controversy, and the hope, perhaps the only way out. For if the current American disorders are not resolved within the democratic processes, if policy is not determined in legislatures and under constitutions, and if disputes are not decided in courts, the battles will be waged in the streets. Meanwhile, lawyers, judges, and the courts they operate are themselves on trial.⁸⁹

So the challenge is not only to cope with traditional problems, but to grapple with and resolve these new and larger issues. It is nothing less than to take a major part in preserving American government. As the contending or embattled participants around us would say: We must get with it—before it is too late.⁹⁰

41 Ill. 2d 177, 242 N.E.2d 208 (1968), *cert.* pending in the U.S. Supreme Court, the trial court was obliged to change the rules for press and television coverage of a notorious murder case, not at the behest of either the People or the defendant, but pursuant to a Supreme Court mandamus action brought by the Chicago Tribune against the trial judge. In the celebrated Chicago Seven trial, extraneous issues involved the whole American political scene, and the challenges to the court were both scandalous and awesome, too familiar to require mention. Every trial judge who has handled "big" cases or "hot potatoes" has his own compendium of challenges. Their just and satisfactory resolution requires personal and political astuteness, soul-searching, some expertise, and courage.

88. See SCHLESINGER, *THE VITAL CENTER* (1949).

89. Notoriety involving judges, national, state and local, has led many judges to fear a "witch hunt" or avoid public discussions. See *A Time for Silence*, editorial, 55 A.B.A.J. 1050 (1969). Any judge must be reasonably circumspect. See also, Snyder, *How About Some Fairness?* 53 JUDICATURE 136 (1969).

But in matters involving the administration of justice, a judge may have a positive duty to speak out. See, the remarks of Chief Justice Warren Burger, reported in 14 AMERICAN BAR NEWS 2 (1969): "Why should it take so long? I ask each judge, federal and state, each lawyer, prosecution or defense, and each law teacher to join to make the American system work. . . . All of this talk about outside activities of judges is totally irrelevant to the matter of improving the administration of justice. . . . Far from withdrawing, I intend to accelerate these activities."

90. Critical as this paper is, it may best be concluded with a *mea culpa* for the writer himself, and an *apologia pro vita sua*. Many remedies considered in this paper have not yet been tried; some would require group action beyond sole control. All this writer claims is an awareness of a need which may be the basis for improvement.